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No. 92-607

In the Supreme Court of the United States

OCTOBER TERM, 1992

ALBERT S. GOODNER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

J. CAROL WILLIAMS
PETER A. APPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether paint waste (consisting of spent solvent, dissolved paint, and waste water) constitutes a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

2. Whether dumping a hazardous substance into open, unlined holes in the ground constitutes the release of a hazardous substance into the environment, in violation of CERCLA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-35) is reported at 966 F.2d 380. The sentencing decision of the district court (Pet. App. 9-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1992. A petition for rehearing was denied on July 7, 1992. Pet. App. 36. The petition for a writ of certiorari was filed on October 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates Goodner Brothers Aircraft, Inc. (GBA), an aircraft refinishing business in Mena, Arkansas. At the times relevant to this case, petitioner and his employees sprayed a solvent containing between 50 and 70% methylene chloride on airplanes to remove paint from them. The solvent caused the paint to blister and fall off. As an airplane was stripped, the solvent, peeled paint, and rinsewater were collected on the floor of the hangar. Petitioner and his employees scooped this waste, which contained paint residue, spent stripper, and water, from the hangar floor into barrels. Tr. 181, 190, 198, 219, 225. Waste was placed in the barrels until they were three-quarters full; when approximately 15 or 20 barrels had accumulated, petitioner directed employees to take them to the Goodner Brothers Farm. There, the employees dumped the contents into either of two ravines or a man-made pit. On one occasion, the contents were loaded into the back of a dump truck and the truck transported the waste to the farm. 1 Tr. 188-194, 199. Petitioner dumped approximately 25 tons of the waste on the farm. Pet. App. 23.

The United States Environmental Protection Agency (EPA) began investigating the GBA facility in September 1988. After obtaining a search warrant, EPA took samples of material coming off the planes and found in the dumpsites. All of the samples found on the farm contained methylene chloride and phenol, with some samples containing as much as 20% of each substance. Pet. App. 24.

2. Section 103(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9603(b), renders criminally

liable any person "in charge of a facility from which a hazardous substance is released, other than a federally permitted release, * * * who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release." CERCLA defines "hazardous substance" as, *inter alia*, "any hazardous waste having the characteristics identified under or listed" pursuant to Section 3001 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921. See 42 U.S.C. 9601(14). RCRA in turn authorizes the Administrator of EPA to specify "criteria for identifying the characteristics of hazardous waste" and for listing particular wastes as hazardous. 42 U.S.C. 6921(a). Exercising that authority, EPA has listed as a hazardous waste:

> The following spent halogenated solvents: * * * methylene chloride * * * ; [and] all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above halogenated solvents * * *.

40 C.F.R. 261.31(a), F002. This F002 listing regulation includes all spent (or used) solvent mixtures or blends that contain ten percent or more of methylene chloride before use.[1]

CERCLA defines a "facility" as:

> any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer

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[1] In addition to listing specific wastes, EPA has defined as a hazardous waste certain mixtures of solid waste and hazardous waste. 40 C.F.R. 261.3(a)(2)(iv). EPA originally promulgated that regulation in 1980. 45 Fed. Reg. 33,084, 33,119-33,120 (1980). The D.C. Circuit invalidated that regulation on procedural grounds in 1991. *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (1991). EPA has since repromulgated the regulation. 57 Fed. Reg. 7628, 7632-7633 (1992).

> or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, *storage container*, *motor vehicle*, rolling stock, or aircraft. * * *.

42 U.S.C. 9601(9)(A) (emphasis added). A "release" is:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, *dumping*, or disposing *into the environment* (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) * * *.

42 U.S.C. 9601(22) (emphasis added). Finally, the term "environment" includes:

> any * * * surface water, ground water, drinking water supply, *land surface* or subsurface strata, or ambient air within the United States * * *.

42 U.S.C. 9601(8)(B) (emphasis added).

3. The grand jury indicted petitioner and GBA on nine counts. Counts 1 through 4 charged petitioner and GBA with dumping a hazardous waste without a permit, in violation of RCRA, 42 U.S.C. 6928(d)(2)(A). Counts 5 through 8 charged petitioner and GBA with releasing a hazardous substance from a facility without notifying the National Response Center, in violation of CERCLA, 42 U.S.C. 9603(b). Count 9 charged petitioner and GBA with failing to apply for a hazardous waste permit, in violation of RCRA, 42 U.S.C. 6928(d)(4). Pet. App. 1-8.

At trial, the district court gave the jury separate instructions for each set of counts. For the first set of RCRA counts (Counts 1-4), the court instructed

the jury that the term "hazardous waste" includes particular listed wastes. Pet. App. 65 (Instruction No. 11). The court then read the spent solvent listing and further instructed the jury that "pursuant to the regulations of [EPA] and the Arkansas Department of Pollution Control and Ecology, when a listed hazardous waste is mixed with a solid, liquid, or semisolid material, the resulting mixture is also a hazardous waste." Pet. App. 65-66. For the other RCRA count (Count 9), the court instructed the jury that the government had the burden of proving that "the wastes were listed or identified by [EPA] as a hazardous waste pursuant to the Resource Conservation and Recovery Act." Pet. App. 70 (Instruction No. 20).

For the CERCLA counts (Counts 5-8), which are at issue here, the district court instructed the jury that "[t]he term 'hazardous substance' is defined to include any hazardous waste listed under the Resource Conservation and Recovery Act. Therefore, because it is listed as an F002 hazardous waste, the spent solvent methylene chloride, and spent solvents which contained more than ten percent methylene chloride before use are hazardous substances." Pet. App. 69 (Instruction No. 17). The defendants failed to object to these instructions, despite having been furnished an opportunity to do so by the district court. 3 Tr. 178-180, 251.

The jury found GBA guilty on four counts of disposing of a hazardous waste without a permit (Counts 1-4) and found petitioner guilty on three counts of failing to notify authorities of a release of a hazardous substance (Counts 6-8). The jury also convicted both defendants of failing to file for a haz-

ardous waste permit (Count 9). The district court sentenced petitioner to 15 months' imprisonment, to be followed by one year of supervised release, as well as a $7500 fine. GBA was sentenced to five years' probation and a $150,000 fine. Pet. App. 9-21, 24-25.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 22-35. While the appeal was pending, the D.C. Circuit, in *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (1991), invalidated EPA's mixture regulation. See note 1, *supra*. After receiving post-argument briefs on the impact of *Shell Oil* on this case, the court of appeals vacated the convictions of petitioner and GBA on the RCRA counts. Because Instruction No. 11 (which related to Counts 1-4) referred to the mixture regulation, the court of appeals concluded that "it is impossible to determine whether the jury found the waste to be a listed F002 waste or whether it relied upon the invalidated mixture rule." Pet. App. 27. The court also noted that Instruction No. 20 (which related to Count 9) contained no separate instruction concerning the term "hazardous waste," and that the definition of "hazardous waste" for all of the RCRA counts "presumably is the one given in jury instruction number 11." *Id.* at 30. The court of appeals therefore reversed the RCRA convictions on those five counts and remanded for a new trial. *Id.* at 29-30.

However, the court of appeals affirmed petitioner's convictions on the CERCLA counts. It reasoned that Instruction No. 17 "specifically identified the waste as a listed F002 hazardous waste and, consequently, eliminated any need for the jury to rely upon the mixture rule." Pet. App. 31-32. The court of appeals also rejected petitioner's contention that his dumping

of waste into ravines and a man-made pit was not a "release" of a hazardous substance from a "facility" into the "environment," finding petitioner's argument contrary to the plain language of the statute. *Id.* at 33.

ARGUMENT

The court of appeals correctly decided, based on a reading of the jury instructions, that petitioner's convictions on three counts under CERCLA were not based on EPA's invalidated mixture rule under RCRA. The court also correctly held that, on the facts of this case, petitioner released a hazardous substance into the environment. Those holdings do not conflict with any decision of this Court or of any court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9-22) that the court of appeals violated the rule of lenity in holding that the waste involved here is a hazardous substance under EPA's F002 listing regulation. The rule of lenity has no application here. It is a rule of statutory construction that is employed only to resolve a "grievous ambiguity or uncertainty." *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974). This Court will rely on the rule only when it is "left with an ambiguous statute" after "seizing every thing from which aid can be derived." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)).[2] In other words, "[t]he rule comes into

[2] For this Court's most recent discussions of the rule, see *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-2110 (1992); *Chapman* v. *United States*, 111 S. Ct. 1919, 1926-1927 (1991), and *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990).

operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

Petitioner claims that the regulations defining hazardous waste are ambiguous. He argues that because the F002 listing regulation does not specifically include the term "paint waste," the regulation, as read in light of the rule of lenity, cannot include the waste he released into the environment. Contrary to petitioner's contention, the regulation unambiguously applies to the waste at issue here.

EPA has listed as a hazardous waste "[t]he following spent halogenated solvents: * * * methylene chloride * * *; [and] all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above halogenated solvents." 40 C.F.R. 261.31(a), F002.[3] The jury heard testimony that the waste involved here consisted of, *inter alia*, the spent solvent methylene chloride. 1 Tr. 190. The stripper that petitioner utilized contained (before use) between 50 and 70% methylene chloride, and many of the samples found at the dumpsites contained more than 20% methylene chloride. Pet. App. 23, 24, 32. Petitioner used the stripper for its solvent properties (*i.e.*, to remove paint from aircraft),[4] and when he could no longer use the solvent for stripping aircraft, he dumped it.

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[3] EPA has defined "spent material" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. 261.1(c)(1).

[4] See 50 Fed. Reg. 53,315, 53,316 (1985).

In these circumstances, the listing unquestionably applies to the waste petitioner disposed of at the farm. See *United States* v. *McDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (affirming CERCLA conviction for toluene-contaminated soil). The rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. at 596. Petitioner seeks to beget an ambiguity where none exists.

2. a. Petitioner's argument (Pet. 22-26) that he did not release a hazardous substance from a facility into the environment is equally without merit. At trial, the government proved that petitioner released (*i.e.*, dumped) a hazardous substance (*i.e.*, the solvent) from a facility (*i.e.*, the storage containers and dump truck) into the environment (*i.e.*, the land surface, which in this case included the natural ravines and man-made pit). The Eighth Circuit properly held that "[u]nder the plain language of the statute, the uncontroverted evidence that the paint waste was dumped from the barrels onto the land falls within the statutory language." Pet. App. 33.

Petitioner argues that his convictions cannot stand because a pit also falls within the statutory definition of "facility" (see 42 U.S.C. 9601(9)(A)) and the government did not show that the waste migrated from the pit farther into the land. Petitioner did not object at trial to the jury instructions on this issue, and his convictions therefore may be reviewed only for plain error. *United States* v. *Young*, 470 U.S. 1, 14-16 (1985). There was no plain error in the district court's instructions applying CERCLA to the facts of this case.

Congress wrote the definitions of CERCLA broadly to cover a wide variety of circumstances. As a re-

sult, the statutory definitions may overlap in certain respects. In this case, the government was required to show only a release from a "facility" into the "environment," and it satisfied that burden by proving that petitioner ordered the paint waste to be dumped from barrels or a dump truck into the two ravines and a man-made pit. The ravines and pit were not facilities (even though a pit might in some circumstances *serve* as a facility); they were part of the environment. This fact-bound issue does not warrant further review.

b. Petitioner is incorrect in contending (Pet. 24-26) that the Eighth Circuit's application of CERCLA's plain language conflicts with decisions of two other circuits. *Fertilizer Institute* v. *EPA*, 935 F.2d 1303 (D.C. Cir. 1991), is inapposite. There, the court of appeals vacated part of a proposed rule that would have required notification any time a hazardous substance is placed into any unenclosed containment structure, including an open tank. *Id.* at 1309-1310. In this case, however, petitioner dumped a hazardous substance into unlined holes (including two natural ravines) in the earth. Those pits form part of the environment under the statutory definition. 42 U.S.C. 9601(8)(B) (environment is "any * * * land surface * * * within the United States"). They are not unenclosed containment structures.

The supposed conflict with *United States* v. *Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991), is based on petitioner's misreading of that case. In *Baytank*, the government appealed from the district court's grant of a new trial in a CERCLA case after the jury had found the defendants guilty. The district court had instructed the jury that a release into containment structures was not a release into the en-

vironment "unless you find that a reportable quantity of the chemical evaporated or otherwise traveled beyond the confines of the containment structure." *Id.* at 619. The Fifth Circuit reversed, holding that the government had introduced sufficient evidence to support conviction and that the district court abused its discretion in ordering a new trial. *Id.* at 619-620. The Fifth Circuit in *Baytank* did not hold that the jury was *required* to find that the hazardous substance in that case volatilized into the air. It simply held that, even under the instructions that the district court gave the jury, the government had proved its case beyond a reasonable doubt. Moreover, it is unclear whether the containment structure in *Baytank* had any contact with the environment, other than contact with the ambient air. In this case, by contrast, the hazardous substance was dumped directly into natural ravines and a man-made pit in the ground. Those surfaces clearly fall within the statutory definition of the "environment." 42 U.S.C. 9601(8)(B).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

J. CAROL WILLIAMS
PETER A. APPEL
Attorneys

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